

Thomas Hiriak

Highly Confidential
New York, NY

July 28, 2004

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1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF MASSACHUSETTS

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5 -----x
6 IN RE PHARMACEUTICAL INDUSTRY
7 AVERAGE WHOLESALE PRICE LITIGATION,
8 -----x

9
10 Civil Action: 01-CV-12257-PBS

11
12 July 28, 2004

13 9:40 a.m.

14
15 H I G H L Y C O N F I D E N T I A L

16
17 30(b)(6) Deposition of THOMAS HIRIAK,
18 held at the offices of Patterson Belknap
19 Webb & Tyler, before David Henry, a
20 Certified Shorthand Reporter and Notary
21 Public of the State of New York.
22

1 A P P E A R A N C E S:

2

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22 (Present by telephone)

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1 T H O M A S H I R I A K , called as a
2 witness, having been duly sworn, was
3 examined and testified as follows:
4

5 EXAMINATION BY MR. HOFFMAN:

6 Q. Good morning.

7 A. Good morning.

8 Q. My name is Allan Hoffman, I'm an
9 attorney for the plaintiffs in this case,
10 and I'd like you to please state your name
11 for the record.

12 A. Tom Hiriak.

13 Q. Is that your full name?

14 A. Thomas C Hiriak.

15 Q. Thank you. Have you ever been
16 deposed before, Mr. Hiriak?

17 A. No.

18 Q. I just want to go over some
19 general groundrules so you understand what
20 is expected of you at the deposition and
21 also so that there is a clear record for the
22 court reporter. Because the court reporter

1 is taking down what you will be saying, you
2 have to give oral responses, no nodding of
3 your head, do you understand that?

4 A. Yes.

5 Q. If you don't hear a question,
6 please tell me and I will be happy to repeat
7 it, do you understand that?

8 A. Yes.

9 Q. If you don't understand the
10 question, ask me to rephrase it and I'll be
11 happy to. Do you understand that?

12 A. Yes.

13 Q. If at any time you want to take a
14 break, this is your deposition, if you need
15 to use the lavatory or anything like that,
16 please feel free to tell me and we'll stop
17 and take a few minute break and proceed with
18 the deposition, is that okay?

19 A. Yes.

20 Q. Otherwise I will assume if you
21 don't tell me that you either didn't hear me
22 or didn't understand the question, that you

1 revenue on the part of physicians, that
2 would be oncology. But reimbursement
3 obviously is going to be a major component
4 in all markets.

5 Q. And OBI was aware that the
6 oncology as well as -- okay, OBI was aware
7 from prelaunch until now that physicians or
8 hospitals in any of these franchise areas
9 were interested in the reimbursement level
10 for using Procrit?

11 MR. SCHAU: Object to form.

12 A. I don't know prelaunch, but
13 reimbursement is a major component of our
14 business.

15 Q. And that's at least true back to
16 1991, will you agree with that?

17 A. I don't know when the indication
18 for oncology, for chemotherapy was actually
19 introduced. If you're asking me, was it as
20 big a driving force when chronic kidney
21 disease was the focus, I would say it
22 definitely has less of a focus at that time.

1 Q. But I guess the best way, because
2 we don't know the exact dates as of today,
3 from the time it got its chemotherapy
4 indication and even before that with respect
5 to the knowledge that they were applying for
6 a chemotherapy indication, OBI was aware
7 that reimbursement was going to be an
8 important factor for physicians and
9 hospitals in using Procrit, is that correct?

10 A. I don't know that.

11 Q. Okay, well, at what point are you
12 sure that OBI was aware the first time that
13 reimbursement was going to be an important
14 factor for physicians or hospitals using
15 Procrit?

16 A. When I joined Ortho Biotech in
17 1998, I know that reimbursement was
18 important then.

19 Q. Okay, and have you done anything
20 to educate yourself as to finding out when
21 it was first known within the company that
22 reimbursement was going to be a key driving

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1 factor?

2 A. No.

3 Q. Are you aware of any written
4 documents that emphasize the amount
5 physicians could receive from reimbursement
6 any time during the class period by using
7 Procrit?

8 MR. SCHAU: Object to form.

9 A. Could you ask the question again?

10 Q. Sure. Are you aware of any
11 documents that emphasize the amount
12 physicians could receive from reimbursement
13 during any time during the class period?

14 MR. SCHAU: Object to form.

15 A. There has been internal analysis
16 looking at that. I'm not aware of any
17 documentation that has ever been used with
18 physicians as it relates to it, but there
19 has been internal analysis obviously looking
20 at the reimbursement environment.

21 Q. Okay, can you tell me what
22 internal analyses you are referring to?

1 A. There has been analysis in the
2 physician market and the hospital market,
3 analysis from a private payer perspective.

4 Q. Who would have created these
5 analyses?

6 A. I've created some, finance.

7 Q. Anybody else?

8 A. Within the strategic customer
9 group there may have been.

10 Q. Any other analyses between 1991
11 and the present that discuss reference or
12 emphasize the amount physicians can receive
13 from reimbursement?

14 MR. SCHAU: Discuss, reference
15 or emphasize?

16 MR. HOFFMAN: Well, originally
17 I asked emphasize.

18 MR. SCHAU: Right, which is why
19 I objected.

20 Q. That's why I'm asking this
21 question, which is --

22 MR. SCHAU: I have no

1 objection. If I heard you correctly, I
2 don't object. Did you ask discuss,
3 reference or emphasize?

4 MR. HOFFMAN: I did.

5 MR. SCHAU: No objection.

6 A. Other documents?

7 Q. Are you aware of any other
8 documents other than the analyses that you
9 discussed thus far?

10 A. There have been presentations
11 that I am aware of.

12 Q. Can you be more specific?

13 A. Yeah, I think the best way to
14 describe it is to -- oncologists know how to
15 make money on drugs. Reimbursement is a
16 very big part of what they do. We deal in
17 an environment that that's been a known for
18 a while, as we talked about. With the
19 competitive environment we're in right now,
20 we have had to analyze that and prepare our
21 sales force for issues that they're going to
22 have to deal with that customers bring up to

1 them in these areas. There has been
2 internal documentation, there has been
3 examples given. Where the line has been
4 drawn though is our product specialists have
5 been informed that they can't in any way
6 talk about margins with their customers. So
7 there is internal documentation, financial
8 analysis, presentations with examples, but
9 it has absolutely stopped, and we've sent
10 out very direct, or direction to a product
11 specialist or our entire sales team not to
12 discuss those issues with customers.

13 Q. So is it your testimony that
14 there has never been any documents that
15 market or discuss any difference between
16 market cost and reimbursement cost to
17 physicians with regard to the use of
18 Procrit?

19 MR. SCHAU: And by that
20 question you mean that are distributed or
21 used with the physician as opposed to
22 internal analyses?

1 Q. That question refers to, again,
2 I'm going to say both. Any document which
3 was either given to the sales force to
4 either communicate to the physicians or
5 hospitals or that they in the end actually
6 gave to physicians or hospitals that discuss
7 the spread between acquisition cost and
8 reimbursement when using Procrit.

9 A. In terms of internal documents, I
10 think we talked, but yes, there are internal
11 analysis that look at that.

12 Q. Okay, let's start with that.
13 What internal analysis do you know of that
14 discusses that?

15 A. We've looked -- when this
16 started, really had to do with when
17 competition was brought on to the
18 marketplace.

19 Q. When was that?

20 A. Aranesp was launched in 2000.

21 Q. Your testimony is Aranesp was
22 launched around 2000?

1 A. Or 2001, I don't know the exact
2 time.

3 Q. And that was the first time when
4 Procrit had a competing drug?

5 A. Yes.

6 Q. I'm sorry, let me just finish,
7 for any of its indications?

8 A. Yes. Well, short of Epogen,
9 excluding Epogen, yes, Aranesp was the first
10 time that we actually had a competitive
11 product. We don't consider Epogen
12 competition.

13 Q. And that's because it was in the
14 dialysis segment?

15 A. Correct.

16 Q. Prior to the introduction of
17 Aranesp, are you aware of any documents,
18 let's just start internally, that emphasize
19 the amount physicians could receive from
20 reimbursement?

21 MR. SCHAU: Object to form.

22 Q. Using Procrit.

1 A. Prior to the preparation for the
2 launch, no, I'm not aware of anything for
3 Aranesp.

4 Q. When you say prior to the
5 preparation of the launch, you are saying in
6 response to the competitive threat of
7 Aranesp?

8 A. Yes.

9 Q. Prior that that you are not aware
10 of any documents internally that discussed
11 reimbursement as to -- as potential profit
12 or reimbursement to physicians or hospitals
13 for the use of Procrit?

14 A. No, I am not aware of any
15 internal documents.

16 Q. Okay, any documents that were
17 delivered externally discussing those
18 issues?

19 A. No.

20 Q. And again we're talking about
21 prior to the launch of Aranesp?

22 A. Yes.

1 Q. Okay, how about after the launch
2 of Aranesp? Are you aware of any documents
3 internally, and I know -- I believe you
4 testified to this earlier but I'm going to
5 ask it again.

6 After the launch of Aranesp, are
7 you aware of any other documents which
8 internally marketed or discussed the spread
9 between acquisition cost and reimbursement
10 for Procrit?

11 MR. SCHAU: Object to form
12 because of your use of the word market.

13 Q. You can answer the question.

14 A. There are internal documents that
15 analyze it.

16 Q. Tell me what those documents are
17 that you can recall.

18 A. There are internal documents
19 analyzing physician reimbursement between
20 Procrit and Aranesp. There are analyses
21 that look at the difference in hospital
22 reimbursement between Procrit and Aranesp.

1 Q. Who generated these documents?

2 A. Again, you know, I have generated
3 some, strategic customer group probably has
4 as well as finance.

5 Q. And who are these analyses
6 distributed to?

7 A. It would be distributed within
8 the strategic customer group, finance, the
9 pricing committee probably had some of it.

10 Q. Sales representatives?

11 A. No.

12 Q. Sales departments?

13 A. Let me just -- it is not
14 distributed to the product specialists.
15 Again, there are examples used in sales
16 meetings to show what the product
17 specialists are going to be up against with
18 their oncologist and mechanisms to deal with
19 it because they're not going to be able to
20 discuss it. So there were examples given
21 where here is what you're going to be
22 dealing with, since we're not going to talk

1 about margins or spread, here is the way to
2 deflect that message back to what we had
3 talked about earlier, clinical, safety, ten
4 years of history and really to turn it
5 around and show that Procrit has a lower
6 cost to the health care system. So there
7 were examples given. But if you're asking
8 me was it distributed to the project
9 specialist, the answer would be no.

10 Q. Who generated those materials?

11 A. It would be the same people that
12 I mentioned earlier, strategic customer
13 group, finance.

14 Q. So there were several -- finance
15 was distributing materials about how to
16 deflect questions from physicians?

17 A. Well again, I think, just to make
18 clear, I said was not distributed. There
19 were no documentation that was distributed
20 out to product specialists. But in the
21 context of these examples, a lot of the
22 analysis was done by finance. Those

1 examples then were built in to
2 presentations, though they wouldn't be
3 giving it, the examples or dealing with
4 sales directions to the product specialist,
5 some of the analytical work obviously was
6 done by finance, but they were not
7 distributed to the product specialist.

8 Q. Finance would do the numerical
9 calculations?

10 A. Yes.

11 Q. Showing the difference in the
12 reimbursement between Aranesp and Procrit?

13 A. Yes.

14 Q. And then who would do the textual
15 analysis or description of how to deflect
16 doctors' questions? Who is in charge of
17 that.

18 A. Sales management.

19 Q. Sales management would generate
20 those materials?

21 A. Would generate the presentation,
22 yes.

1 Q. And who would that be presented
2 to?

3 A. That would be presented to the
4 sales team, sales management product
5 specialist.

6 Q. For each franchise?

7 A. That I don't know. What I am
8 specifically talking about is oncology.

9 Q. Okay, and would those materials
10 ultimately be given to sales
11 representatives?

12 A. No.

13 Q. None of what we discussed would
14 ever make its way to the sales
15 representatives?

16 A. No.

17 Q. And why is that?

18 A. Because Ortho Biotech has made a
19 decision that we are not going to sell or
20 market Procrit on the spread. We do sell on
21 the cost to the health care system. We
22 think that that's a much more appropriate

1 way to deal with the issue of financials or
2 economics, but we made a decision that we're
3 not going to market Procrit on the spread.

4 Q. When was that decision made?

5 A. I think that that's always been
6 the policy of Ortho Biotech.

7 Q. Dating back to 1991?

8 A. That's my understanding.

9 Q. And what is the basis of your
10 understanding? Where did you learn that
11 from?

12 A. Yeah, I've spoken with people
13 that have been in sales management since
14 that time, and their recollection, their
15 understanding is that that's always been
16 Ortho Biotech's policy.

17 Q. So it's your testimony that Ortho
18 Biotech has never communicated to physicians
19 or emphasized to physicians that they could
20 potentially profit from reimbursement of
21 Procrit?

22 A. What I'm testifying is that the

1 corporate policy and the direction that has
2 been provided by Ortho Biotech Corporate is
3 that we are not in any way to market on the
4 spread of the drug, that's absolutely
5 correct. Can I say that there hasn't been
6 random cases of product specialists doing
7 it, I just don't know that. I don't have
8 any reports of it, but I don't know that for
9 a fact. But I am saying that that's what
10 the corporate policy has been at Ortho
11 Biotech.

12 Q. Okay, so you are saying it would
13 only be like a maverick sales representative
14 who would do something like that?

15 MR. SCHAU: Object to form.

16 Q. Okay, do you understand my
17 question? I'm just trying to understand
18 what it was that you just said, because you
19 gave me the company policy, but you said it
20 was possible that in some instances sales
21 representatives may have discussed profit
22 yield with physicians or hospitals.

1 Correct?

2 A. I'm saying that the corporate
3 policy has been that. I don't know for
4 product specialists. In response to your
5 last question now, you had asked if Ortho
6 Biotech has never done it, it's impossible
7 for me to answer that. I can say that Ortho
8 Biotech's policy has always been that we do
9 not, the product specialists do not market
10 Procrit on the spread.

11 Q. And if any of the franchises ever
12 violated that policy, what would be the
13 consequence?

14 A. Obviously it would be a violation
15 of Ortho Biotech policy. I don't know what
16 action would be taken.

17 Q. It's your testimony that no
18 documents have ever been created to
19 emphasize reimbursement to clinics,
20 physicians or hospitals by OBI?

21 A. When you say reimbursement, you
22 are talking about the spread?